

Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors

HIGH COURT (MIRI) — ORIGINATING SUMMONS NO MR(24) 25 OF 1996

RICHARD MALANJUM J
4 SEPTEMBER 1996

Arbitration — Agreement — Jurisdiction of the court — Whether s 34(1) of the Arbitration Act 1952 ousted the court's jurisdiction — Whether s 25(2) of the Arbitration Act 1952 restricted the application of s 34(1) — Arbitration Act 1952 ss 25(2) & 34(1)

A contract was entered into between the plaintiff and the defendants which were collectively working on a joint-venture basis. Pursuant to the contract, the defendants were expected to construct for the plaintiff what was known as the Bintulu Onshore Facilities Expansion Project ('the project'). The price for the project which was initially at RM127,091,129.05 was revised to RM243,000,000 and had been paid to the defendants. However, the defendants proceeded to make an additional claim of RM125,507,761. This was disputed by the plaintiff. As a result, the defendants issued a notice of arbitration pursuant to cl 28(6) Part 2 of the conditions of the contract and served it on the plaintiff. They also filed a copy of the same and their statement of claim with the Kuala Lumpur Regional Centre for Arbitration ('the Centre'). The plaintiff filed an originating summons in the Miri High Court and prayed, inter alia, that the arbitration agreement set out in the contract entered into between the plaintiff and defendants should cease to have effect pursuant to s 25(2) of the Arbitration Act 1952 ('the AA 1952') or under the common law or under the inherent jurisdiction of the court. The defendants opposed the application and raised a preliminary objection. Counsel for the defendants contended that in view of s 34 of the AA 1952 and its interpretation, the court had no jurisdiction to hear the present application.

Held, dismissing the plaintiff's application:

- (1) On a literal interpretation of s 34(1), it expressly excludes the application of any of the provisions of the AA 1952 in any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or the United Nations Commission on International Trade Law Arbitration Rules 1976 ('the UNCITRAL Rules') and the Rules of the Kuala Lumpur Regional Centre for Arbitration. In the present case, it was very clear that cl 28(6) of the contract stipulated the governing rules and the place of arbitration, namely the UNCITRAL Rules as applied by the Centre and to be held in Kuala Lumpur. Therefore s 34(1) of the AA 1952 was applicable and hence it was plain that s 25(2) should be excluded (see p 288F-G).

- A (2) The words in s 34 were plain, clear and precise. The section excluded the court from exercising its supervisory function under the AA 1952 or under any other written law in respect of arbitrations held under the Rules of the Centre (see p 290B); *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183 followed. As the provisions of the AA 1952 were excluded in any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or the UNCITRAL Rules and the Rules of the Centre, s 25(2) was therefore excluded as well (see p 289B-C).
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- C (3) Between ss 25(2) and 34(1) of the AA 1952, although the former was specific in nature and the latter a general provision and there was a rule of construction expressed in the maxim 'generalibus specialia derogant', it was also a general precept that it was inappropriate to read provisions which confer jurisdiction by the making of implications or imposition of limitations not found in the express words of the legislative provision. Moreover the opening words 'notwithstanding anything to the contrary in this Act or in any other written law' as found in s 34(1), should dispel any notion that s 25(2) had a restrictive effect upon s 34(1) of the AA 1952 (see p 290D-F); *David Grant & Co Pty Ltd v Westpac Banking Corporation* [1996] 1 CLJ 129 followed.
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- E (4) There was no reason for the court to resort to common law principles or its inherent jurisdiction when there were clear statutory provisions on the subject. The reliance upon the inherent jurisdiction of the court would ultimately lead to the sources of the powers of the court such as the Courts of Judicature Act 1964 and the Rules of the High Court 1980 which were 'written law' falling within the ambit of s 34(1) of the AA 1952 (see pp 290H-291A).
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[Bahasa Malaysia summary]

- G Suatu kontrak telah dimasuki di antara plaintif dan defendan yang telah bekerja bersama berdasarkan suatu usaha-sama. Menurut kontrak tersebut, defendan adalah dikehendaki membina untuk plaintif suatu Projek Perkembangan Kemudahan Dalam Pesisir Bintulu ('projek tersebut'). Harga projek tersebut yang pada mulanya ditetapkan pada RM127,091,129.05 telah dikaji semula kepada RM243,000,000 dan ianya telah dibayar kepada defendan. Walau bagaimanapun, defendan telah terus membuat tuntutan tambahan sebanyak RM125,507,761. Ini telah dipertikaikan oleh plaintif. Akibatnya, defendant telah mengisukan notis timbangtara menurut fasal 28(6) Bahagian 2 syarat-syarat kontrak dan telah menyerahkannya ke atas plaintif. Mereka juga telah memfailkan salinan notis tersebut serta pernyataan tuntutan dengan Pusat Serantau Timbangtara Kuala Lumpur ('Pusat tersebut'). Plaintif telah memfailkan saman pemula di Mahkamah Tinggi Miri dan telah
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memohon, antara lainnya, bahawa perjanjian timbangtara yang disenaraikan dalam kontrak di antara plaintif dan defendan sepatutnya tidak lagi mempunyai kesan menurut s 25(2) Akta Timbangtara 1952 ('AT 1952') atau di bawah common law atau di bawah bidang kuasa sedia ada mahkamah. Defendan telah melawan permohonan tersebut dan telah membangkitkan bantahan awal. Peguam bagi pihak defendan telah berhujah bahawa berdasarkan s 34 AT 1952 dan tafsirannya, maka mahkamah ini tidak mempunyai bidang kuasa untuk mendengar permohonan ini.

Diputuskan, menolak permohonan plaintif:

- (1) Atas tafsiran literal s 34(1), ianya dengan nyata mengetepikan peruntukan AT 1952 dalam mana-mana timbangtara yang dijalankan di bawah Konvensyen Penyelesaian Pertikaian Pelaburan di antara Negara-Negara dan Warganegara Negara-Negara Lain 1965 atau Kaedah-Kaedah UNCITRAL dan Kaedah-Kaedah Pusat Serantau Timbangtara Kuala Lumpur. Di dalam kes ini, adalah sangat jelas bahawa fasal 28(6) kontrak itu memperuntukkan kaedah-kaedah yang terpakai dan tempat timbangtara, yakni Kaedah-Kaedah UNCITRAL seperti yang dipakai oleh Pusat tersebut dan diadakan di Kaula Lumpur. Maka s 34(1) AT 1952 adalah terpakai dan oleh itu, adalah jelas bahawa s 25(2) adalah diketepikan (lihat ms 288F-G).
- (2) Perkataan-perkataan dalam s 34 adalah mudah, jelas dan tepat. Seksyen tersebut mengetepikan mahkamah daripada menjalankan fungsi peneliaannya di bawah AT 1952 ataupun di bawah mana-mana undang-undang bertulis berkenaan dengan timbangtara yang dijalankan di bawah Kaedah-Kaedah Pusat tersebut (lihat ms 290B); *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183 diikuti. Oleh kerana peruntukan AT 1952 adalah diketepikan dalam mana-mana timbangtara yang dijalankan di bawah Konvensyen Penyelesaian Pertikaian Pelaburan di antara Negara-Negara dan Warganegara Negara-Negara Lain 1965 ataupun Kaedah-Kaedah UNCITRAL dan Kaedah-Kaedah Pusat tersebut, maka s 25(2) juga adalah diketepikan (lihat ms 289B-C).
- (3) Di antara ss 25(2) dan 34(1) AT 1952, walaupun s 25(2) adalah bersifat khusus dan s 34(1) adalah peruntukan am dan terdapat kaedah tafsiran seperti yang dinyatakan dalam maksim 'generalibus specialia derogant', ianya juga adalah prinsip am bahawa adalah tidak wajar membaca peruntukan yang memberikan bidang kuasa dengan membuat implikasi dan pengenaan had yang tidak didapati dalam perkataan-perkataan nyata peruntukan undang-undang tersebut. Lagipun perkataan-perkataan pemula 'tidak kira apa-apa yang bertentangan dalam Akta ini ataupun di mana-mana undang-undang bertulis yang lain', seperti yang didapati dalam s 34(1), harus menyangkal sebarang tanggapan bahawa s 25(2) mempunyai kesan menghadkan s 34(1) AT 1952 (lihat ms 290D-F); *David Grant*

- A *& Co Pty Ltd v Westpac Banking Corporation* [1996] 1 CLJ 129
diikut.
- (4) Tidak ada sebab mengapa mahkamah harus menggunakan prinsip-prinsip common law ataupun bidang kuasa sedia ada apabila terdapatnya peruntukan statut yang jelas mengenai perkara tersebut.
- B Pergantungan kepada bidang kuasa sedia ada mahkamah akhirnya akan membawa kepada sumber-sumber kuasa mahkamah seperti Akta Mahkamah Kehakiman 1964 atau Kaedah-Kaedah Mahkamah Tinggi 1980 yang merupakan 'undang-undang bertulis' dalam lingkungan s 34(1) AT 1952 (lihat ms 290H-291A).]
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Notes

For cases on the jurisdiction of the court in arbitration proceedings, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 710-712.

D

Cases referred to

Dalmia Dairy Industries Ltd v National Bank of Pakistan [1978] 2 Lloyd's Rep 223 (refd)

David Grant & Co Pty Ltd v Westpac Banking Corporation [1996] 1 CLJ 129 (folld)

- E *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177 (refd)

Heydon's case (1584) 76 ER 637 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

- F *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183 (folld)

Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy [1982] 2 MLJ 232 (refd)

Loy Chin Hei v PP [1982] 1 MLJ 31 (refd)

Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor [1995] 1 MLJ 719 (refd)

- G *New India Assurance Co Ltd v Lewis* [1967] 1 MLJ 156 (refd)

Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97 (refd)

Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG [1993] 3 MLJ 68 (refd)

- H *Swee Pte Ltd v Lim Kian Chai & Anor* [1983] 1 MLJ 353 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317 (refd)

Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd [1996] 2 MLJ 265 (refd)

- I *Wah Bee Construction Engineering v Pembinaan Fungsi Baik Sdn Bhd* [1996] 2 AMR 2412 (refd)

Legislation referred to

Arbitration Act 1952 ss 25(2), 34(1)

Arbitration Act 1950 [UK]

Arbitration Ordinance [Sarawak]

Civil Law Act 1956 s 3

Courts of Judicature Act 1964

Federal Constitution art 121

Rules of the High Court 1980

United Nations Commission on International Trade Law Arbitration

Rules 1976 art 21(1), (3)

Jimmy Wee (Jimmy HT Wee & Co) for the plaintiff.*Victor Wong (Victor Wong & Chiew)* for the defendants.*Cur Adv Vult***Richard Malanjum J:***The application*

By way of an originating summons dated 26 June 1996 (encl 2) and as amended pursuant to leave of the court made on 19 August 1996, the plaintiff prays for the following orders (verbatim):

- (1) that pursuant to s 25(2) of the Arbitration Act 1952 ('the AA 1952') and/or under common law and/or under the inherent jurisdiction of this honourable court, the arbitration agreement set out in cl 28(6) of Part 2 of the conditions incorporated into an agreement entered into between the plaintiff and the above-named first, second and third defendants shall cease to have effect;
- (2) that pursuant to s 25(2) of the AA 1952, leave be granted to revoke or suspend the appointment and authority of WSW Davidson, the arbitrator, appointed by the first, second and third defendants under the said agreement;
- (3) costs of and incidental to this originating summons may be paid by the first, second and third defendants;
- (4) such other order/relief as this honourable court shall deem fit.

The application was supported by the affidavit of Mr Gerawat Gala, the legal advisor of the plaintiff sworn on 25 June 1996. A second affidavit in support was also sworn on 9 August 1996 and filed by the same deponent.

The defendants opposed the application and had filed an affidavit in opposition (encl 5) deposed by Mr Thomas Alexander Green, whose designation was described as the deputy project manager. A supplementary affidavit (encl 8) by the same deponent was also sworn on 18 July 1996 and filed herein.

The undisputed facts

In early 1994, contract 588116 ('the contract') was entered into between the plaintiff and the defendants, which were collectively working on a joint-venture basis. Pursuant to the contract, the defendants were expected

- A to construct for the plaintiff, what was known as the Bintulu Onshore Facilities Expansion Project ('the project'). The project consisted of, inter alia, the construction of a slug-catcher, receiving facilities, two on-shore 36-inch pipelines and stabilization plant. The initial lump-sum contract price for the project was RM127,091,129.05. After an extension was given, it was finally completed on 31 January 1996. The price was also revised to RM243,000,000 and had been paid to the defendants. However, that was not the end of the matter. The defendants proceeded to make an additional claim of RM125,507,761. That was disputed by the plaintiff. As a result, the defendants issued a notice of arbitration pursuant to cl 28(6) Part 2 of the conditions of the contract and served it on the plaintiff. They also filed a copy of the same and their statement of claim with the Kuala Lumpur Regional Centre for Arbitration ('the centre'). The defendants had since appointed their arbitrator, namely, Mr WSW Davidson.

For convenience, cl 28(6) of the contract is reproduced. It reads:

- D The COMPANY and the CONTRACTOR hereby agree that any dispute which may arise in connection with the activities contemplated in the CONTRACT on the application, implementation, validity, breach or termination of the CONTRACT, or any provision thereof (whether resulting from a claim in contract, tort or otherwise) shall be finally and exclusively settled in accordance with the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules as applied by the Regional Centre of Arbitration at Kuala Lumpur, Malaysia. The place of arbitration shall be the Regional Centre for Commercial Arbitration, Kuala Lumpur. The number of arbiters shall be three and the third arbitrator shall always be a suitably qualified and experienced lawyer.

Meanwhile, paras 65 and 66 of the statement of claim read:

- F 65 In breach of the contract, the respondent held meetings with the claimant's subcontractors implying that the contract between the respondent and the claimant was to be terminated and that the subcontractor would be asked to take over the claimant's work. This has resulted, inter alia, in the subcontractor resisting the claimant's management and thereby giving rise to disruption of work and extra costs to the claimant: claimants bundle C6.18.
- G 66 Further, the respondent advised the claimant's bank that the respondent was about to terminate the contract with the claimant, upon which the claimant's bank froze the claimant's account and thereby preventing the claimant from meeting their payments to their subcontractors and suppliers: claimants bundle C6.18.

H *The preliminary objection*

- I Basically, the application of the plaintiff hinges on s 25(2) of the AA 1952 and/or the common law and/or the inherent jurisdiction of the court. But a preliminary objection was raised by the defendants. I shall first deal with this objection before going into the merits of the application, if necessary.

In raising the preliminary objection, learned counsel for the defendants referred to s 34(1) of the AA 1952 and the judicial pronouncements of the Malaysian courts on the issue. Specifically, the cases of *Klockner Industries-Anlagen GmbH v Kien Tat Sdn Bhd & Anor* [1990] 3 MLJ 183 and

Soilchem Sdn Bhd v Standard-Elektrik Lorenz AG [1993] 3 MLJ 68 were cited. It was the contention of learned counsel that in view of the section and its interpretation, this court has no jurisdiction to hear the present application. He went on to submit that arts 21(1) and 21(3) of the United Nations Commission on International Trade Law Arbitration Rules 1976 ('the UNCITRAL Rules') should provide the forum and mode for the plaintiff to present its grievances, and the forum was not the Malaysian courts. It was further submitted that parties to an agreement should be held to their bargain. The case of *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97 was referred to. More so in this case, learned counsel said, where the agreement was prepared by the plaintiff in which case the contra proferentum rules should apply.

In respect of the inherent jurisdiction of the court, it was argued on behalf of the defendants that it should not be allowed to nullify or stultify the clear provision of the AA 1952.

As regards paras 65 and 66 of the statement of claim, learned counsel for the defendants submitted that they did not necessarily imply improper conduct or conspiracy — and by asking the court to invoke its power pursuant to s 25(2) of the AA 1952, would tantamount to requesting the court to exercise its supervisory function which should not be permissible under s 34(1) of the AA 1952.

For the plaintiff, learned counsel submitted three reasons why s 34(1) should not be applied in this case. Learned counsel said that, first, s 34(1) of the AA 1952 could not be applied when fraud or conduct akin to fraud as defined under s 25(2) of the AA 1952 had been alleged. Secondly, the word 'arbitration' in s 34(1) should be given a restricted interpretation. Thirdly, s 34 only excludes the supervisory function of the court under the AA 1952 or any other written law but it does not deprive a party from seeking the aid of the courts to enable it to avail itself of any common law right it may be entitled to.

On the first reason, learned counsel argued that the present application would not involve the exercise of supervisory function by the court unlike the situation in *Klockner's* case. The application was for an order that the arbitration agreement shall cease to have effect — and if the order was granted, that should be the end of any arbitration proceedings. The UNCITRAL Rules and the Rules of the centre would also be irrelevant. Even if art 21 of the UNCITRAL Rules applied, it has been held that the power of the arbitrator to decide on the question of jurisdiction is not final but subject to review. The case of *Dalmia Dairy Industries Ltd v National Bank of Pakistan* [1978] 2 Lloyd's Rep 223 was cited.

Learned counsel also added, but unsupported by any authority, that where a party has been alleged to have acted fraudulently or acted in a way akin to fraud, he should be entitled as a matter of absolute right to have the matter tried in open court before a judge.

In respect of the second reason, learned counsel contended that the word 'arbitration' in s 34(1) should only be confined to an arbitration which had been properly referred to the centre. In the present case, in view of the allegation of conspiracy and improper conduct, such a matter is not fit for trial before an arbitrator but before a High Court judge.

A In addition, learned counsel said that there is a presumption against the ousting of the court's jurisdiction unless it is very clear in a statute. Similarly, there is also a presumption against interfering with a citizen's right of access to the court unless expressly stated otherwise in a statute.

B Other points raised by learned counsel in support of the second reason were:

- (1) there is a contradiction between ss 34 and 25 as regards the power of the court. Since there is a doubt, it should be interpreted in favour of the plaintiff;
- (2) that s 25(2) although earlier enacted, is specific in nature whilst s 34 is general and makes no reference to the specific subject. As such, the earlier provision with specific terms should prevail over the later provision with general terms; and
- (3) that the centre only deals with disputes of an international character, that is to say, where the parties belong to or are residents in two different jurisdictions or the dispute involves international commercial interest. In the present case the parties are Malaysian companies and under one jurisdiction, ie Malaysia. Moreover, nothing was shown by the defendants that the facts of this case satisfy the application of s 34(1).

E In further contending the third reason, learned counsel said that s 34 did not oust the inherent jurisdiction of the courts. He added that courts of other jurisdictions, particularly the English courts, had granted relief to parties accused of fraud by staying arbitration proceedings even without specific statutory provision. Learned counsel also said that it would enable other affected parties accused of conspiracy and improper conduct to defend themselves if the matter was brought before the court.

F In concluding, learned counsel for the plaintiff went on to state that he was not saying that cl 28(6) should be ignored entirely. However it should not be binding in all cases and circumstances. Where there is an allegation of fraud and improper conduct, s 25(2) should apply.

G Before considering the points raised in connection with the preliminary objection, perhaps it is appropriate to reproduce here the statutory provisions in issue.

Section 25(2) of the AA 1952 reads:

- H 25 (2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to arbitration, and a dispute which so arises involves the question whether any such party has been guilty of fraud, the High Court shall, so far as may be necessary to enable that question to be determined by the High Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke the authority of any arbitrator or umpire appointed by or by
- I virtue of the agreement.

And s 34 of the AA 1952 reads:

- 34 (1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to sub-s (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur. A
- (2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in sub-s (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in sub-s (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate. B
- (3) The competent court for the purpose of such enforcement shall be the High Court. C

It is not in dispute that s 34 was enacted in 1980 when the AA 1952 was amended vide Act A478/1980, whereas s 25 has been in the AA 1952 since 1952 when the AA 1952 was then known as the Sarawak Arbitration Ordinance No 5 of 1952. The Ordinance was modelled after the Arbitration Act 1950 of the United Kingdom. On 1 November 1972, the Ordinance was adopted as the Act for the whole country. D

Now, upon reading the application, it is obvious that the plaintiff, inter alia, is seeking for an order from the court based on s 25(2) of the AA 1952. In short, a provision of the AA 1952 is being invoked. However on a literal interpretation of s 34(1), it expressly excludes the application of any of the provisions of the AA 1952 in *any arbitration* held under the Convention as stipulated therein or the UNCITRAL Rules and the Rules of the centre. Emphasis should be given to the words 'any arbitration'. There is no exception or qualification given, such as the requirement for a dispute to be of international commercial interest or that the parties must be residents of two different jurisdictions. And in the present case it is very clear that cl 28(6) of the contract stipulates the governing rules and the place of arbitration, namely, the UNCITRAL Rules as applied by the centre and to be held in Kuala Lumpur. Thus, upon reading cl 28(6) it is apparent that s 34(1) is applicable and hence it is plain that s 25(2) should be excluded. There is therefore no merit to say that the defendants had failed to show facts which could satisfy s 34(1). After all cl 28(6) is very clear and s 34(1) has no ambiguity. Hence, there is no necessity for additional qualifying facts to be shown. No doubt in the introduction booklet of the centre, in the proviso, the nature of disputes which the centre would deal with are stipulated. However, such proviso appears to be not in consonant with the wordings of s 34(1). Further, there is nothing from the materials before me indicating the historical background of s 34 which should be considered in interpreting it (see *Heydon's case* (1584) 76 ER 637). E

- A Learned counsel for the plaintiff attempted to make a distinction between the supervisory function of the court and the present application. He seemed to think that s 34(1) only covers the supervisory function of the court and that the present application did not come within the ambit of supervisory function. Perhaps he was convinced of the validity of the argument due to the usage of the term 'supervisory function' in *Klockner's* case. However there are at least two weaknesses in the argument.

- B Firstly, it fails to appreciate the wordings of s 34(1). As stated earlier, the provisions of the AA 1952 are excluded in any arbitration held under the Convention or the UNCITRAL Rules and Rules of the centre. If the provisions are excluded that should include s 25(2). Therefore, the question as to the nature of the court's function under s 25(2) does not arise.
- C Secondly, there is nothing in s 34(1) or in the whole of the AA 1952 implying the different functions of the court towards arbitration proceedings. Indeed, in *Klockner's* case, the issues of locus standi and capacity were presented to the court for determination. They involved interpretation of an article in the debenture and the relevant provisions in the Companies Act 1965. Yet his Lordship Zakaria Yatim J (as he then was) declined to grant the relief prayed for. Hence, the term 'supervisory function' used in *Klockner's* case should therefore include such function as envisaged by s 25(2). Incidentally, I do not think the issues in *Klockner's* case were merely procedural matters as contended by learned counsel for the plaintiff herein.

- E As regards the argument that the word 'arbitration' in s 34(1) should be given a restricted meaning, with respect, I cannot agree. Whether or not an arbitration has been properly referred to the centre should initially depend on the terms of the arbitration clause itself. After all, it is beyond question that an agreement to arbitrate is to be treated on no different footing from any other contract (see *Wah Bee Construction Engineering v Pembinaan Fungsai Baik Sdn Bhd* [1996] 2 AMR 2412. See also *New India Assurance Co Ltd v Lewis* [1967] 1 MLJ 156 FC, *Swee Pte Ltd v Lim Kian Chai & Anor* [1983] 1 MLJ 353 and *Elf Petroleum SE Asia Pte Ltd v Winelf Petroleum Sdn Bhd* [1986] 1 MLJ 177).

- F Further, to say that the reference to the centre in this case has become irregular due to the allegations of conspiracy and improper conduct and thus s 25(2) applies, would tantamount to circumventing the effect of s 34(1). If s 34(1) applies in the first place, then there is no longer any question of referring to the other provisions of the AA 1952.

- G On the issue of the presumption against ousting the jurisdiction of the courts, unless clearly stipulated in a statute and the presumption against interfering with the citizen's right of access to the courts, such argument at first seems persuasive; more so, in view of the apparent trend of our courts recently in allowing judicial review if there is an error of law regardless of how wide an ouster clause may have been drafted (see *Sykt Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 CA, and approved in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 FC.). Indeed in *Lian Ann Lorry Transport & Forwarding Sdn Bhd v Govindasamy* [1982] 2 MLJ 232, Salleh Abas FJ (as he then was) expressed the view that it would be unconstitutional

as it would be contrary to art 121 of the Federal Constitution if an Act were to arrogate the interpretation of a statutory provision to another body other than to the courts.

However, after anxious consideration on the issue, I have no hesitation to agree with his Lordship Zakaria Yatim J in *Klockner's* case when he said this at p 185:

... the words in s 34 are 'plain, clear and precise'. Reading the clear language of the section, I am of the view that the section excludes the court from exercising its supervisory function under the AA 1952 or under any other written law ... in respect of arbitrations held under the Rules of the Arbitration Centre.

Accordingly, that aspect of the argument of learned counsel for the plaintiff fails — and with that, the assertion of doubt due to contradiction existing between ss 25(2) and 34(1) also fails.

On the point that s 25(2) should prevail over s 34(1) as the former is specific in nature, this argument seems to be the converse, though it may also be correct, of the generally accepted canon of construction whereby if a general term in a statute is followed by a more specific term then the latter prevails. Such rule of construction is expressed in the maxim 'generalibus specialia derogant' (see *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng & Anor* [1995] 1 MLJ 719, *Loy Chin Hei v PP* [1982] 1 MLJ 31 and *David Grant & Co Pty Ltd v Westpac Banking Corp* [1996] 1 CLJ 129). However, it is also a general precept that 'it is inappropriate to read provisions which confer jurisdiction ... by the making of implications or imposition of limitations not found in the express words of the legislative provision', per Gummow J in *David Grant's* case. Hence, in view of the general nature of s 34(1) and being the later provision, I cannot agree that its effect should be limited by s 25(2). Indeed the opening words 'notwithstanding anything to the contrary in this Act or in any other written law' as found in s 34(1), should dispel any notion that s 25(2) has a restrictive effect upon it.

Finally, in respect of the reference to common law and/or the inherent jurisdiction of the court to grant the order prayed for, I also find it to be without any merit.

Firstly, there is no reason for the court to resort to common law principles or its inherent jurisdiction when there are clear statutory provisions on the subject (see s 3 of the Civil Law Act 1956). And the common law referred to by learned counsel for the plaintiff could only mean the English common law. However, the judicial trend of our courts nowadays is not to follow the common law of foreign jurisdictions slavishly. In *Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd* [1996] 2 MLJ 265, his Lordship Gopal Sri Ram JCA said this at p 309:

... While we may refer to the decisions of courts of those jurisdictions where the law is akin to our own, we must therefore ultimately have regard to the words of our own statute.

A Secondly, the reliance upon the inherent jurisdiction of the court will ultimately lead to the sources of the powers of the court such as the Courts of Judicature Act 1964 and the Rules of the High Court 1980. But these are also 'written law' and come within the ambit of s 34(1) of the AA 1952.

B As for the argument that third parties affected should be given the opportunity to defend themselves over the allegation, I think they should be allowed to decide what course of action to take. But their predicament, if any, should not be a reason to circumvent the clear provision of s 34(1).

Conclusion

C For the foregoing reasons, I should therefore sustain the preliminary objection. Accordingly, there is no necessity to consider the implications of paras 65 and 66 of the statement of claim in relation to s 25(2) as this court has no jurisdiction to deal with the issue in view of s 34(1) of the AA 1952. The inevitable conclusion is that I should dismiss the present application with costs to the defendants to be taxed unless agreed.

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Application dismissed.

Reported by Izzatty Izzuddin

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